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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
Plaintiff)
vs.) No. 1:16-cv-12182-FDS
JANSSEN BIOTECH, INC.,)
Defendant.)
)
)
)
)

BEFORE THE HONORABLE M. PAGE KELLEY
UNITED STATES MAGISTRATE JUDGE
MOTION HEARING

John Joseph Moakley United States Courthouse
One Courthouse Way
Boston, Massachusetts 02210

May 6, 2021
2:03 p.m.

Kristin M. Kelley, RPR, CRR
Official Court Reporter
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Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE CLERK: Today is Thursday, May 6, 2021, and we are on the record in Civil Case No. 1612182, the United States of America verse Janssen Biotech Tech, Inc., the Honorable M. Page Kelley presiding.

Could we have counsel for the plaintiff please identify themselves and then counsel for the defendant. Thank you.

MR. LEOPOLD: Good afternoon, your Honor. Ted Leopold and Casey Preston on behalf of the relator.

THE COURT: All right. Good afternoon.

MR. POSNER: Ethan Posner, Sarah Tremont, Shanya Dingle and Nick Baer from Covington & Burling for the defendant. Good afternoon, your Honor

THE COURT: Good afternoon to everyone there too.

So we're here for a continuation on the relators' Motion to Compel. Just to let the parties know, I think I've received everyone's letter. The last thing I got was a May 6th letter, a three page letter from you, Mr. Posner, and then yesterday a letter from relator. I think I'm all set. I have the status report. I have reviewed those things. I'll hear you, Mr. Leopold.

MR. LEOPOLD: Thank you, your Honor. I'm not sure if your Honor had any particular order on how you would like to address the issues. I'm happy to proceed in any fashion your

1 Honor would like.

2 THE COURT: Well, I do want to make sure that we
3 understand -- I don't want to get too far afield from the
4 phased discovery. As far as nationwide discovery, I'm trying
5 my best to limit it to things that are sort of trickling down
6 from above and not spreading out through the United States. So
7 maybe just with that in mind.

8 MR. LEOPOLD: Sure. I think we can start a little bit
9 on the broader side and narrow the issues down a little bit.

02:06 10 First, let me start with the issue of rolling
11 production. I think that goes into the issue of ESI as well.
12 We're dealing with two primary issues. I'll handle the rolling
13 production issue and the net effect of that. Mr. Preston will
14 also deal with the issue of the ESI, if that's okay with your
15 Honor.

16 First, as it relates to the rolling production, as
17 many times as we have inquired from the Court and the Court has
18 inquired of defense counsel, we still do not have any date yet
19 where they have affirmatively stated when their production will
02:06 20 be complete. Since we are on a tight time frame, this makes it
21 very concerning to us.

22 In light of that issue, I think another factor also
23 needs to be expressed to the Court that gives us great pause.
24 There seems to be a little bit of a bottleneck, although the
25 parties appear to be generally close, which Mr. Preston will

1 address, on the ESI issues. It seems most things are focused
2 on the ESI issue when we have a significant request for
3 production to them, which is distinct and different from ESI,
4 as I know your Honor is aware. So we are dealing with a
5 request for production of actual documents, hard documents, if
6 you will, physical documents that are in the control of someone
7 or somewhere at the defendants, and we can't seem to really
8 even get those documents.

9 As many times as we read in their papers of the
02:07 10 millions and millions of documents they've produced to date,
11 despite all of the hearings we've had and the conversations and
12 meet and confers we've had, we don't -- we have the Department
13 of Justice documents, although that's not complete yet in terms
14 of production. They're still looking at those. We have the
15 relators' digital file. That's really about it so far. We
16 don't have responses to the various requests for production.

17 What is the status of that? When will that be
18 provided to us? When will the rolling production on those
19 items be to us? That has nothing to do with ESI related
02:08 20 issues.

21 So we are asking the Court, and I appreciate all -- I
22 do think it's helpful to have meet and confers but we don't
23 seem, with all due respect, I say this not in any way
24 reflecting on defense counsel, I think it's just the nature of
25 the issues, we have spent a lot of time meeting and conferring

1 but we never seem to get very far. We seem to come back to
2 your Honor. This is now, I think, the third time generally
3 with the same issues. We can't get a confirmation of an end
4 date for rolling production. We don't know the status of the
5 request for productions that we've had. We still don't have
6 complete production of the DOJ documents. We don't have the
7 relators' digital file.

8 I'll let Mr. Preston talk about that goes in tandem
9 with this ESI production issue.

02:09 10 MR. PRESTON: Good afternoon, your Honor.

11 THE COURT: Good afternoon.

12 MR. PRESTON: Before I get into the ESI, to add one
13 additional point to Mr. Leopold's comments there, the core
14 documents in this case, as we've talked about in both of the
15 prior hearings, are the management level documents that relate
16 to the oversight, the monitoring, the review of the legality of
17 these services, the value of these services. Those are the
18 core issues in dispute here. That is what we haven't yet
19 received.

02:10 20 Frankly, it seems once we receive those documents,
21 that will make the ESI process much easier because right now
22 the plaintiff is going based on her memory. We don't have the
23 documents, the core documents, to reference the key terms. So
24 the terms now have to be broader and the terms also seek
25 documents that really should be produced without having to do

1 ESI searches. So once those core documents, which your Honor
2 and Chief Judge Saylor have instructed the defendants to
3 provide to this point, that will also make the ESI process more
4 efficient.

5 Directly more towards the ESI, the search queries that
6 we have been discussing with defense counsel, and we have
7 reached an agreement on a master list of search queries, but as
8 soon as we reach an agreement, Janssen basically immediately
9 upended it by saying that they want to impose substantial
02:11 10 limitations on these searches using geographic limiters.

11 Your Honor, the plaintiff's blowing the whistle on
12 conduct that's been occurring systematically over a long period
13 of time. There are going to be a substantial volume of
14 documents and data that need to be produced, even in this first
15 phase. It's unavoidable. Simply because there's a large
16 volume of relevant documents, the defendant can't just impose
17 broad restrictions that will cause highly relevant documents to
18 not be turned over. Use of the geographic limiting factors are
19 going to filter out what are an extremely large number of
02:12 20 highly relevant documents, which is exactly why Janssen is
21 proposing. The geographic references don't normally appear in
22 e-mails and policy documents and training materials or other
23 discussions between managers and different levels of managers.

24 Those are important documents that go to the core
25 issues in this case. To limit Janssen's production, even if

1 it's only for certain custodians to those documents that
2 contain those specific geographic terms, is really going to
3 filter out a significant number of highly relevant documents.

4 THE COURT: Can I just ask you to get a little more
5 particular on this argument? So you're asking for documents
6 concerning these areas that everyone agrees, well, maybe not
7 everyone, but Chief Judge Saylor and I think should be
8 provided: Oversight monitoring, the valuing and the review of
9 illegality. Are you now talking about training documents when
02:13 10 you're talking about they're filtering the ESI?

11 MR. PRESTON: No, your Honor. What their proposal is
12 is to apply these geographic limiters to every search query.
13 So we had finally agreed upon a list of search queries that
14 cover the main issues in dispute, covers several of the key
15 reports that the plaintiff is aware of. The geographic
16 limiters would apply to everything, not just some training
17 materials. It would apply to all documents that are being
18 sought after through these searches.

19 Your Honor, we're aware of numerous documents at this
02:14 20 early stage of discovery that we consider to be strong evidence
21 that supports the plaintiff's allegations that don't contain
22 these geographic terms. If the geographic limiters are
23 imposed, then Janssen's going to be relieved from having to
24 produce these in large quantities of other highly relevant
25 documents.

1 THE COURT: I don't think this is the end of discovery
2 in this phase. I think, assuming you get beyond this phase,
3 you will get more discovery. Janssen says they will not seek
4 to apply the geographic term limitations for the relators'
5 documents or for the additional four custodians who are senior
6 management level employees. You think even if you get
7 unfettered access in the searches to senior management level
8 employees, you still need nationwide discovery on the terms
9 that you've agreed to? I'm trying to wrap my mind around this.

02:15 10 MR. PRESTON: Your Honor, these searches are within
11 the parameters of the phased discovery. The particular
12 custodians that Janssen is proposing to apply these limiters to
13 are three individuals who formerly served as the plaintiff's
14 direct manager, call them the regional managers. A woman,
15 Karen Trahan, who was a level above them, and she was really a
16 key person in all of this and a more senior manager than these
17 direct managers, these managers all take directives from the
18 national managers and executives at Janssen. And there's going
19 to be discussions that go up the chain of command concerning
02:16 20 the services at issue that are within this phase of discovery,
21 as they are services that the plaintiff provided for 13 years
22 at the directive of these managers. These managers, when they
23 correspond with each other, they're not sticking in geographic
24 terms in their correspondence. It's really inefficient.

25 At Janssen's request, the Court has phased discovery

1 here. So plaintiff has been limited, and we've been working
2 within those limitations, but this is just going to take things
3 to a whole other level and make discovery really inefficient
4 because then, in phase two, are we going to go back and have to
5 rerun more searches for these same witnesses?

6 THE COURT: I see what you're saying. Okay.

7 MR. PRESTON: Your Honor, the ESI protocol that
8 Janssen agreed to, it called upon the parties to coordinate on
9 the ESI search query, and that's what we've done. We've a
02:17 10 final agreement as to a list of search terms. These were
11 requests by Janssen to strike and revise several search
12 queries. We did that. We went further and we found additional
13 search queries that we voluntarily removed or have revised. In
14 all, there's 31 queries that have been removed over the last
15 week as part of this process. We've revised a hundred others.

16 We told Janssen, if there's a particular problem with
17 the search query, let us know and we'll work with you. If
18 you're receiving false positives because of the search query,
19 let us know and we'll work with you. We're not -- we don't
02:18 20 have any interest in getting a bunch of irrelevant documents,
21 but what we do want are the relevant documents.

22 In our view, what Janssen is proposing with the
23 geographic limiters is contrary to the ESI protocol. It's
24 drastic. And it would be highly prejudicial.

25 THE COURT: Let me just ask you. You're satisfied

1 with the list of queries that you agreed on except for the
2 geographic limitations?

3 MR. PRESTON: Yes, your Honor.

4 THE COURT: I'm happy to hear you further. I think I
5 understand why you're saying that.

6 MR. PRESTON: One final point, your Honor. The
7 plaintiff here, she filed this case in October of 2016. She's
8 been patiently waiting to finally have an opportunity to obtain
9 the evidence that she believes is going to prove her
02:19 10 allegations. If it takes a few more weeks to review these
11 additional documents or a month, we've been patiently waiting
12 for this opportunity for years. We just want the relevant
13 documents that we've requested.

14 THE COURT: Okay. Mr. Posner, do you want to address
15 the ESI dispute and the dates, setting dates for the rolling
16 production? Do you want just to let plaintiff make their whole
17 argument? It's up to you.

18 MR. POSNER: Whatever is best for you. It probably
19 makes sense, your Honor, for me to focus on the issue just
02:20 20 described. Does that make sense?

21 THE COURT: Yes. Go right ahead.

22 MR. POSNER: So we've produced certainly well over two
23 million pages, most of the DOJ production. The rest of it, I
24 think, will be in about a week. When the relator says we've
25 produced relators' digital file, that's tens of thousands of

1 pages. Obviously, within that are a lot of management level
2 documents. As you know -- and I appreciate the Court's
3 interest in keeping this to the phase as set forth by Chief
4 Judge Saylor. As you know, the vast majority of documents in
5 the DOJ production don't relate to this district at all.
6 They're not management. They just go -- it's nationwide
7 discovery. We produced it, obviously. We're also searching
8 hard copy sources as well.

9 As is set forth in our letter -- and I know this
02:21 10 letter was filed just before the argument. We're moving very
11 quickly here. We're bringing a lot of issues to you. I
12 appreciate you reading these letters quickly. I know I just
13 filed ours today. I appreciate you looking at that.

14 What the relator wants, the master list, that the two
15 parties have agreed to, is about 190,000 documents, so maybe as
16 many as a million of pages for just the first four custodians.
17 So what we're trying to do is to see if we can limit that. The
18 way we came up with is to limit it to the territory.

19 As your Honor rightly points out, for the senior
02:22 20 people or more senior people that they added, we're not
21 imposing that limit. I'd like to, but we're not. That's going
22 to be, as we note in our letter, a likely similar amount of
23 documents now without the geographic limiters. Maybe that's
24 over a million pages on top of the couple of million pages they
25 already have, plus the hard copy and other sources we're

1 searching.

2 So what we were trying to do was see if we could limit
3 the first wave of custodians in a way that was focused on the
4 district that the Court said we need to focus. That cuts it by
5 a little bit more than half. So under a hundred thousand.
6 Still massive, but that was our intent, to try to focus this
7 case, as your Honor said, on this particular district. They're
8 still going to get, as I said, a ton of information. They
9 already have a ton of information, including management level
02:23 10 documents. They're going to get the senior documents. We've
11 already agreed to provide when your Honor said, give them the
12 stuff from the creation and the legal review, I don't care if
13 that goes back 22 years. We're looking for that. So they're
14 still going to get that. We were just trying to impose a
15 reasonable limitation on the initial wave of production.

16 This is not that complicated a case. They ought to be
17 able to prove their case with sort of millions of pages of
18 documents. They keep saying, when are you going to be done,
19 but I want you to use really broad search terms. I want you to
02:23 20 search millions of documents. When are you going to be done?
21 To which we say, if we can limit this more, the answer is we'll
22 be done sooner, obviously. The math is going to work that way.
23 We have given you the search terms we want to use, and when you
24 take that together with the other information that we have
25 already produced or will produce, you're going to have more

1 than everything they need, and they're still going to get
2 possibly as many as a million pages, even using our own search
3 terms with the limiters from all the custodians. We're not
4 limiting the second tranche of custodians.

5 THE COURT: So what do you say to Mr. Preston's
6 assertion that if you take these first four custodians, their
7 communications with the higher-ups are not necessarily going to
8 be captured by repeated references to their own district? I
9 believe that's what he's saying.

02:24 10 MR. POSNER: But they included the higher-ups in the
11 number of custodians without those limiters. The DOJ
12 production has a ton of management level documents. We're just
13 speculating on what it's going to exclude. What I can tell you
14 is it's going to cut the 190,000 by a little over half.

15 THE COURT: I'm delighted to cut it in half, but the
16 question is what are you cutting out.

17 MR. POSNER: The answer is, look, ultimately I don't
18 know for certain because we haven't run all this. What I can
19 tell you is it's still going to be hundreds of thousands of
02:25 20 pages and it's still going to include communications about her
21 region. It's still going to include, even by our own estimate,
22 it's going to include the Pennsylvania region, central -- the
23 answer is it may exclude some things that went to other areas,
24 but that's the point.

25 If we have to go to phase two in this case, you just

1 remove those limiters, they're going to get other custodians.
2 It's easy enough to produce more from these existing
3 custodians.

4 As your Honor said, we're trying to phase this for a
5 reason. We're trying to take the relators' allegations and
6 what happened in the relators' district and see if it violates
7 that statute. If it doesn't, the case is over. If it does,
8 you look at other regions in other districts. This is more
9 than enough to get a snapshot as to the legality of these
02:26 10 programs because they're already getting a ton of senior level
11 information.

12 So I can't -- I don't know what it excludes. I know
13 what it includes. It certainly includes anything that -- it
14 certainly includes the things that went down the chain into
15 her -- to her and into her district. It includes that. That's
16 going to be a fair amount of management level stuff. That's
17 all I can tell you. It's not going to include every page they
18 want.

19 THE COURT: Let me ask Mr. Preston, if you don't mind,
02:27 20 to respond to that. Go ahead, Mr. Preston.

21 MR. PRESTON: I want to clarify one thing. Mr. Posner
22 just made a significant mischaracterization of phase one
23 discovery. Chief Judge Saylor did not say at the end of phase
24 one discovery there is a summary judgment process. Phase one
25 discovery is to get more information about the services at

1 issue, the policies from management that directed those
2 services, the key issues in the case before opening it up to
3 broad discovery. And this has been discussed at other hearings
4 and is laid out in our papers.

5 What Chief Judge Saylor was concerned about, and
6 wisely so, is to open up discovery to ABS activity, specific
7 activity with physicians in other regions. That is a whole
8 area of other discovery that he wanted to avoid until we had a
9 good understanding of the services that are at issue and
02:28 10 limiting the activity between the relator and physicians, the
11 discovery toward those activities to this region.

12 At the management level, which is the key area where
13 the information at issue rests, is not limited to just
14 Pennsylvania. Your Honor has guided us on that. So it's just
15 inaccurate to say that this whole phase one is just going to
16 lead to a summary judgment process. That is not what Chief
17 Judge Saylor said.

18 With regard to the geographic limiters, your Honor,
19 Mr. Posner acknowledged that approximately a hundred thousand
02:29 20 documents that he has no idea what the contents are other than
21 they were responsive to the search terms that Janssen has
22 agreed to and, in fact, most of those search terms Janssen
23 created. At the very start of the search term process, Janssen
24 put together the list of search terms. So now they're saying
25 these are way overbroad and we need these geographic limiters.

1 They want the geographic limiters because they don't want to
2 produce relevant evidence.

3 Your Honor, managers have conversations via e-mail,
4 important conversations. Managers aren't going to just put in
5 there this conversation relates to central Pennsylvania, this
6 conversation relates to the town of Bethlehem.

7 THE COURT: Okay. I think I'm following you.

8 MR. POSNER: Your Honor, one thing.

9 THE COURT: Go ahead. We interrupted you. Go ahead.

02:30 10 MR. POSNER: Sorry. I know you know this. They're
11 getting the senior level people they pick. We haven't tried to
12 impose those limiters. They are. They're already getting all
13 those senior level documents.

14 I'm sorry. Your Honor had a question?

15 THE COURT: No. So here's the thing. I'm going to
16 order Janssen to go ahead and give up the geographic limiter
17 terms and just do what you agreed to before the imposition of
18 those terms. I know that we're piling more and more on here.
19 So if you need more time in order to sort through these things,
02:31 20 I invite you to file something with Judge Saylor once you
21 figure it out, setting out the additional time you would need.
22 Try to be very conservative about that because I do think he
23 will give you some more time, but I don't think he will give
24 you much more time.

25 Let's just do the ESI in that way. And I think I may

1 hold you to your statement, Mr. Posner, that you think you can
2 complete the DOJ production within one week. I'm not going to
3 order that you finish it in one week to the hour, but let's get
4 that done within a week or so. If it turns out it's eight days
5 or nine days, that's fine. Let's aim for seven days to
6 complete that.

7 MR. LEOPOLD: On that issue, we appreciate the time
8 frame and, of course, all Ethan has to do is call if he needs
9 an extra day. Whatever it is, it's not a problem. On the
02:32 10 request for production, I realize there is going to be a search
11 for ESI, but we do have the request for production of documents
12 that has been outstanding for months.

13 MR. POSNER: We've responded to that repeatedly.
14 We've given you our responses. We've told you what you're
15 searching. I don't like to interrupt, but this is really going
16 beyond the path.

17 THE COURT: We'll hammer out some additional dates in
18 a minute. Let's talk about, if you don't mind, Interrogatory
19 No. 18 that asked Janssen when did it begin and stop providing
02:33 20 the services at issue. I'd just ask you, Mr. Posner, to
21 respond to that, if you don't mind.

22 MR. POSNER: As I said, I don't think the company has
23 discontinued the provision of these services. That's because
24 they're lawful. DOJ investigated. They made this big point
25 about how the justice has been delayed here. Actually, the

1 United States Department of Justice, the U.S. Attorney's Office
2 in your district is known for many things. Being soft on the
3 pharmaceutical industry is not one of those things.

4 THE COURT: I know that. I'm well aware of that. Let
5 me just ask you. With regard to stopping then, it is not
6 stopped?

7 MR. POSNER: Not as far as I know. These services are
8 publicly available. They're normal. They're all over the
9 industry. That's why they've kept going, because they're
02:34 10 lawful. All right? In terms of when they started, do you want
11 me -- we could look through a ton of documents to figure out it
12 started at 8:00 a.m. on September 23, 1999. A, they don't have
13 to have the hour and second when that occurred at the beginning
14 of the case.

15 Like we've gone -- there's no case that supports their
16 point on the interrogatories. The reason we identified a bunch
17 of cases here, there's points on the interrogatories, in
18 fairness, your Honor, and respectfully, board on the frivolous.
19 They're not allowed to tell, to have all of these requests
02:34 20 about identify every instance of X, identify every instance of
21 Y. We can tell generally, we think the services started in
22 this general period, which we think we've done already. What
23 do you want, the date? You want Monday, October 4, 1998? It's
24 all within the scope of the time period anyway.

25 THE COURT: Mr. Leopold.

1 MR. LEOPOLD: Your Honor, I'm trying to focus on the
2 discovery issues and disputes. With all due respect, besides
3 interruptions, if we were to play back all the things that
4 Janssen has stated in this hearing thus far, it's how much of a
5 burden we are on Janssen, how many millions of documents
6 they're producing, what they have to do and things of that
7 sort. We're entitled. This is what discovery is for. This is
8 what the rules of federal procedure has allowed.

9 THE COURT: I only have about 25 more minutes. Just
02:35 10 go through Interrogatory No. 18 with me. Can you tell me if
11 they give you a general date when something started?

12 MR. LEOPOLD: Of course we would like due diligence of
13 counsel talking to their client and getting the most specific
14 date possible. Nobody is asking for the hour, the seconds, et
15 cetera. That's not the way discovery runs. I assume Covington
16 knows that.

17 What we do want is a verified jurat page to the best
18 of their ability what the answer to an interrogatory is, and
19 that is required under the rules. That's all we're seeking.
02:36 20 If that date, whatever it is, is a good faith effort of counsel
21 to do their due diligence by asking their client, that's what
22 is called for and that is what we're requesting. So whatever
23 date that they can do with a verified verification page, we
24 will take that. That is what we're asking for.

25 And if discovery points something out and we find out

1 that due diligence wasn't done, we will be coming back to your
2 Honor for appropriate relief, but just give us the best they
3 can by doing good due diligence lawyering work that I'm
4 assuming Covington is aware of and can do. That is what we
5 want.

6 MR. POSNER: Interrogatory 18 doesn't ask for that.
7 I'm quoting. "Identify each month in the years 1998 to
8 present", so 23 years times 12, "that you provided IOI support,
9 including identifying each topic or type of IOI support that
02:37 10 was provided during each such month". That's what the
11 interrogatory says. That interrogatory is plainly improper.

12 MR. LEOPOLD: That's something completely different.
13 Give us the best date you can. You said you were going to be
14 able to do the most --

15 THE COURT: I'm going to ask you not to address one
16 another. If you don't mind, I'm going to ask you, maybe not
17 specifically the two of you, but some two other lawyers to see
18 if they can negotiate this and confer on this and come up with
19 a less picayune request and a more specific answer. Honestly,
02:38 20 the request does seem very, very broad. I understand why it's
21 drafted that way. Let's confer on that and give whatever best
22 dates you can, Mr. Posner, as far as when certain services were
23 provided.

24 I know there's a dispute about when the information
25 ends and that Janssen says they don't have to produce

1 information beyond 2016 because that's when the relator left.
2 I just wonder why it doesn't make sense at this phase of
3 discovery to end things in 2016 for the time being.

4 I'll hear you on that, Mr. Leopold.

5 MR. LEOPOLD: Your Honor, we will do that. That's
6 fine. That's fair.

7 THE COURT: All right. With regard to Interrogatory
8 No. 17, Mr. Posner, the identifying presentations, documents,
9 et cetera, that be made available to the public via the
02:39 10 internet, I think they're just trying to value the services,
11 right?

12 MR. LEOPOLD: That's correct, your Honor.

13 MR. POSNER: So they want to know -- I'm quoting
14 again. "Identify any and all presentations, documents and
15 programming that you provided to IOI accounts", assuming the
16 time period for this is what, 1998 through 2016, "be made
17 available to the public via the internet, including the date
18 when the presentation document or program first became". We'll
19 have to review all this.

02:40 20 THE COURT: Can I ask you? Were these presentations
21 made available to the public?

22 MR. POSNER: Some were, not every presentation and
23 document that you provided to IOI account. Was every
24 presentation and document over an 18-year period publicly put
25 on the internet? No. I have to -- don't I have to do two

1 things? I have to look at, I don't know, hundreds of different
2 presentations over 18 years, and then I have to compare.
3 I'd -- the internet, are they in cache pages? I'd have to go
4 back and compare each year. Was it made available on the
5 internet in 2007, 2008? I've never heard of an interrogatory
6 like that.

7 MR. LEOPOLD: Your Honor, maybe the better --

8 THE COURT: Go ahead, Mr. Leopold.

9 MR. LEOPOLD: Maybe one of the things that counsel
02:41 10 could do is, instead of looking through thousands of pages of
11 documents, I'm not sure a document is going to say if it's on
12 the internet, but maybe ask the most appropriate people who
13 would have knowledge about the issue and ask. That's all that
14 he can generally do.

15 MR. POSNER: I'd have to -- you're not allowed to
16 require me to do an investigation and go to -- J&J doesn't have
17 a file on things put on the internet that -- we don't have a
18 file on that. I'd have to go to a lot of different people. We
19 can do that as discovery emerges, but there's no requirement to
02:41 20 do that now.

21 THE COURT: Hang on a second, everyone. I think I'm
22 going to deny this without prejudice at this time. It seems to
23 me this might be for a 30(b)(6) witness or somebody who has
24 some institutional knowledge. I don't think it's so critical
25 that we're going to deal with it now. I want to focus on the

1 ESI and the other outstanding discovery right now.

2 What else, Mr. Leopold?

3 MR. LEOPOLD: Your Honor, we have 5, 7, 8, 9, and 15,
4 which I think can be summed up pretty similarly. In the letter
5 that you received and based on my review of the letter, it does
6 not reference the way it is couched in the letter. We don't
7 ask about all people. We ask specifically who were the people
8 that decided the particular issue.

9 I think if we just look at No. 5, for example, it's
02:42 10 not overbroad. Respectfully, I think it's quite specific:
11 "Identify each employee who decided that you would contract or
12 who was involved in the decision for the two different outside
13 companies". We don't ask -- in their letter in their first
14 line, "all people", that's not what it says.

15 All counsel for a client can do is use their best
16 efforts. I think it is incumbent on counsel to do some
17 investigation with their client to get answers to discovery.
18 That's all that we're asking here. We do that for five. We do
19 that for seven. It's not all people. It's just give us the
02:43 20 name of the employee that made the decision, that decided. We
21 do that for number eight. We do that for nine.

22 In regards to 15, we just asked them to give us the
23 facts that support their affirmative defense. We had this
24 conversation, I believe, at the last hearing. I think we're
25 entitled to know what the facts are that support their

1 affirmative defense.

2 THE COURT: Let me go back to your interrogatories 5,
3 7, 8 and 9. I agree these are employees with significant
4 knowledge about the claims in the case.

5 What can you do, Mr. Posner?

6 MR. POSNER: We can do what we did, which is we
7 identified specific employees. Ken Gilmer and Mike Wolf have
8 knowledge about this. I'm not aware of any case -- I'm trying,
9 your Honor. I'm really trying.

02:45 10 THE COURT: I can see that, Mr. Posner.

11 MR. POSNER: Look, I've been doing this a long time.
12 You've been doing this a long time. We've all been doing this
13 a long time. This is -- giving you the contracts, people that
14 executed it and specific names. The interrogatory says
15 "identify each employee who decided that you would contract or
16 was involved" --

17 THE COURT: What you've given is the contracts over
18 what period of time?

19 MR. POSNER: Sarah, do you know the answer to that?

02:46 20 MS. TREMONT: We'd have to get back to you.

21 MR. POSNER: The more important point is we gave two
22 people who have knowledge about the contracts with Xcenda. So
23 that's -- to give them all the people, "identify each employee
24 who decided that you would contract or was involved in your
25 decision to contract" --

1 THE COURT: That's overbroad. I grant you that's
2 overbroad. What they are saying in their letter is that you
3 provided a vice president of sales and marketing from 2002, two
4 marketing employees from an undisclosed period, and a
5 compliance officer from 2013 to '16, and you don't specify what
6 decisions they performed, if any.

7 MR. POSNER: Think of how many documents I'm going to
8 have to look through to find out all of that at this stage in
9 litigation. That's not what interrogatories require. You can
02:47 10 get that through other discovery potentially, but that's not
11 what the -- they don't require us to review 50,000 pages and do
12 a mini investigation for them. That's our point on Rule 26,
13 your Honor.

14 MR. PRESTON: Your Honor, if I may. This is Casey
15 Preston. It's troubling that at this point we're nearly
16 6 months into searching for documents. They're not aware of
17 who the key people are. How are we supposed to have any
18 confidence that they're appropriately gathering documents in
19 response to our requests if they don't know who the key people
02:47 20 are? We're just asking who are the decision-makers, who are
21 the people with the most involvement in these services, not
22 just from 2002.

23 Mr. Posner says he has acknowledged these services are
24 ongoing. We're not asking for every single person but we're
25 asking for people that we can go out and, one, make sure we're

1 getting the appropriate documents that we've asked for and,
2 two, we know who to go out and depose. Right now we're
3 completely in the blind. In their initial disclosures, they
4 identified three people. In their interrogatories, they've
5 identified four people.

6 They're so quick to talk about how this is a practice
7 that's been occurring for 20 years and that they've got to
8 produce millions of pages of documents. Where are they getting
9 these documents from? Have they not reviewed the allegations
02:48 10 with their client?

11 MR. LEOPOLD: Your Honor, if I could just say this.
12 Like some on this, I've been doing this a long time, well over
13 30 years now. If we were to take the actions that Janssen
14 wants us to take and said all these people for depositions and
15 try to figure out who are the right people, they would be
16 coming to you with a protective order, saying it's a fishing
17 expedition and we're taking all these people for no reason at
18 all. Instead of using a number of depositions, we're trying to
19 get the answer to who is the right person to depose.

02:49 20 THE COURT: Okay. I get what you're saying, but I
21 really think you're talking past each other. Mr. Preston is
22 saying we want to know who the key people are. Your
23 interrogatories are asking for every single person. I'm sorry
24 again, but let's confer on this and figure out what are you
25 going to be satisfied with and what do they have.

1 Mr. Posner, you're going to have to do better than
2 what you've done so far. They need to know who are they going
3 to depose to talk about the contract with Xcenda and The Lash
4 Group, and it may be over time, and the same with these other
5 issues, the infusion services review, and that type of thing.

6 MR. POSNER: Didn't we give two specific names?
7 Xcenda is this unbelievably tangential issue. The Lash Group
8 provided benefits review. It's not even relevant for this
9 case. Even a little issue like Xcenda, we gave them two names.
02:50 10 Isn't that the people to depose?

11 THE COURT: Who are the two names?

12 MR. POSNER: The two names were Janssen's Ken Gilmer
13 and Mike Wolf have knowledge about Janssen's contracts with
14 Xcenda.

15 THE COURT: Are they the people? If you depose them,
16 are they going to be like, this is in 2002?

17 MR. POSNER: I haven't done, like, an 18-year
18 exhaustive review, but I certainly told them -- I told them
19 that they'd have knowledge about these contracts. That's all
02:50 20 I'm required to do at this stage.

21 MR. LEOPOLD: Your Honor, if I can say this, I
22 appreciate what counsel is saying. Maybe at the end of the day
23 we might be left with these two people. I don't know. We
24 should know who at the time -- we're not at the point where
25 we're going to take a deposition yet. We just want to know,

1 and it's clear in the interrogatory, who made the decision.
2 Who was the person at the time making the decision? If that
3 person's not there anymore, doesn't mean we can't go and take
4 his deposition. The person now may not even have been there
5 who they've cited as the person with, quote unquote, knowledge.
6 That's not the issue that we're trying to get to. We want to
7 get to the person who made the decision of why this company was
8 initially retained. That's the core issue, not just somebody
9 has knowledge about a contract. I could get a tenth grader to
02:51 10 read the contract.

11 THE COURT: I want you to redo your interrogatories to
12 ask for what you just asked for, not this every single person
13 and that type of thing.

14 MR. LEOPOLD: We say the employer who decided.

15 MR. POSNER: Your Honor, I would have them redo these
16 interrogatories and ask really specific questions. We feel
17 like we've more than answered each and every one of these
18 interrogatories. I'd ask they redo them with a very specific
19 list of questions, and obviously we'll engage with them.

02:52 20 MR. LEOPOLD: I don't know how I could -- I could
21 break my back and yell with every single question, which seems
22 to be happening here. I'm not sure how else we can ask a
23 question when we say, who decided to get into this. That's
24 what the interrogatory says. I'm not sure how more clear and
25 concise we can ask that question. I'm just not sure.

1 THE COURT: Here's what I'm going to do. I'm not
2 going to have them rephrase the interrogatories. I'm going to
3 have you confer on the existing interrogatories and see if you
4 can reach some agreement on what should be provided. It may
5 be, Mr. Posner, you've provided the names and that's that and
6 it may be that you can come up with some better information for
7 them.

8 MR. POSNER: Your Honor, I don't understand why -- we
9 supplemented our interrogatories. He keeps saying what I
02:53 10 really want to know is X and the interrogatory, as you've
11 observed, doesn't say X. It says something quite different.
12 Why is it so difficult to ask them to just specify what you
13 want? Put it in writing so we know what the question is. Why
14 is that so hard to do?

15 THE COURT: Either way, I want the parties to confer
16 on 5, 7, 8, 9, and 15 further and figure out how you can reach
17 agreement on what the question is and what the answer is.
18 We're not going to go right back to the drawing board. Scratch
19 that that I suggested that. We're going to just move forward
02:54 20 as expeditiously as we can on that.

21 What's interrogatory 15? That's the one about
22 employees who assert in their affirmative defense reasonably
23 interpreted statutes and regulations. Mr. Posner, what's the
24 problem with identifying those employees?

25 MR. POSNER: Interrogatory 15, I hate to keep quoting,

1 "state all the facts that you believe support your contention
2 in affirmative defense No. 13 that Janssen reasonably
3 interpreted the statute and regulations, including identifying
4 all persons involved in interpreting the statute and
5 regulations".

6 That's what it says. It calls for a legal conclusion.
7 It's a contention interrogatory. That's why we cited the
8 cases. What we said -- we also cited specific statutory
9 programs. They want to know all the reasons -- state -- what
02:55 10 does 15 say? 15 says "state all the facts that you believe
11 support your contention that this was a reasonable
12 interpretation of the statutes and regulations".

13 I mean, A, they want us to identify lawyers involved?
14 We're still investigating what happened 22 years ago. What do
15 you actually want?

16 THE COURT: Mr. Leopold?

17 MR. LEOPOLD: Your Honor, you ordered this to be
18 answered last time. That's why they had a supplemental
19 response. Then this is what we have.

02:56 20 I think when we asked for state all the bases and
21 facts that support your affirmative defense, we're entitled to
22 know the facts or else we're not going to be able to counter
23 the affirmative defense by way of moving to strike it, summary
24 judgment, whatever it may be. I think we're entitled to
25 recited regulations. And case law is not the facts that they

1 are relying upon to support their own affirmative defense.

2 We had this same argument last time. This is what
3 they gave it. I don't think it's appropriate. And if it is
4 lawyers, that doesn't mean we get to take their deposition, but
5 we're entitled to. That's not privileged. We're entitled to
6 know in an answer to an interrogatory the names of the people
7 involved.

8 That's where we're at at this point. We're not at the
9 point where we're setting a deposition. If we were to do that,
02:57 10 for whatever reason, I'm not saying we would, you could raise
11 that issue. You could file a protective order or whatever.
12 We're not there yet. We're at an answer to an interrogatory
13 with, which all due respect, Mr. Posner, every time we come
14 back, you've already been ordered to answer it.

15 THE COURT: Okay. So Mr. Posner, do you not have any
16 employees you would proffer in support of that defense?

17 MR. POSNER: In support of our defense -- we lay out
18 our defense of the case in Interrogatory No. 1, which we cite
19 back to. You want to know the employees that will support our
02:57 20 defense? It's a lot of people and it's a lot of documents.
21 It's lawful. I'm struggling. They said "state all the facts
22 that support your affirmative defense". Our affirmative
23 defense is it's lawful, and a lot of people were involved in
24 that in the execution of this.

25 THE COURT: For an affirmative defense, that seems

1 pretty vague. I'm sure you have more specific information to
2 kind of beef up just that it's lawful.

3 MR. POSNER: We do in Interrogatory No. 1, which we
4 cite back to. We go on for several pages about why we think
5 this -- if you want us to supplement why we think this was
6 lawful, I don't know what else -- that's why these things of
7 kind of contention interrogatories are not permitted and are
8 certainly premature at this stage.

9 THE COURT: Okay. So I'm going to just reserve on
02:58 10 Interrogatory No. 15 at this time. Okay? I really want the
11 parties to focus on actually producing some discovery,
12 Mr. Posner, getting it done, and getting it done quickly. I
13 think Judge Saylor, I know we don't have a transcript of that
14 hearing yet, but I know Judge Saylor understands it's a lot of
15 discovery to produce in a short period of time. Let's get busy
16 and just do the ESI production, finish up the DOJ production,
17 and then the so-called rolling production that is comprised of
18 other information, right? Mr. Leopold, it's not complete?

19 MR. LEOPOLD: That's correct, your Honor. We'll have
02:59 20 to go through the numerous objections they have to our requests
21 for production. We'll do a meet and confer and come back to
22 your Honor as soon as we can to tee those issues up. Whatever
23 documents have not been produced yet related to the requests
24 for production that has been outstanding for months, I would
25 just like to have something from your Honor, respectfully, so

1 they can go to their client and say, the Court has ruled those
2 documents be produced. If they need to come back for an
3 extension for a week or whatever, that's no problem. Without a
4 due date, it makes it difficult for all parties, especially
5 with respect to defense counsel.

6 THE COURT: Mr. Posner, how much time do you need?

7 MR. POSNER: Your Honor, I was reacting to something
8 he said.

9 You sort of said it. Obviously, we've been busy for a
03:00 10 while. I don't mean to suggest we were doing something
11 different. The Court ordered phase discovery. We're not going
12 to worry about San Diego or Cleveland. We're not going to
13 worry about that stuff. The Court set a series of deadlines.

14 Since then, I think it's fair to say, the discovery
15 has been expanded, and we are obviously confronting the review
16 and production. We've already produced a few million pages,
17 but we're now confronting the review and production of more
18 than a million pages based on your Honor's ruling for today,
19 which obviously increases the scope.

03:01 20 It's hard for me to give you a date on that large
21 discovery. As I mentioned to Chief Judge Saylor, there's a
22 well worn process for your review. You have to look at each
23 document for privilege and responsiveness and get stamped, and
24 then it's got to be reviewed by some lawyers. We have our
25 normal process that your Honor is familiar.

1 I appreciate that you want us to go quickly. And
2 there's obviously a lot of people on this case. We are
3 confronting a completely asymmetric, right? They're not doing
4 anything. They've just completely ignored our discovery
5 requests. So this is totally asymmetric.

6 We're obviously going to need more time than
7 July 16th. I just don't have a date for you at this point.
8 Your Honor just upped our review of the documents by a factor
9 of two. I understand your ruling. I'm just saying that's the
03:02 10 impact. The more documents we have to produce, the more time
11 it's going to take.

12 THE COURT: Why don't you finish the DOJ production.
13 And what other than the ESI is still outstanding, Mr. Leopold?

14 MR. LEOPOLD: Yes, your Honor. One of the things that
15 has not been mentioned that Judge Saylor actually did say at
16 the end of the hearing was that this is very good for
17 Mr. Posner coming to him because they can stay busy with their
18 firm to get the documents reviewed. He ended the hearing that
19 way. So I think we should all keep that respectfully in mind.

03:03 20 The last thing that's on our agenda to talk about,
21 which we have met and conferred several times regarding the
22 issue, the defense of it makes no sense to me, and I've asked
23 several times, it's about whether or not the documents, all of
24 which are stamped attorneys' eyes only and, as your Honor
25 recalls, we addressed this at the last hearing. We agreed the

1 relator could look at the DOJ documents. I agreed at that time
2 they could have a month or whatever they wanted within reason
3 to look at the documents and take off what's -- because they've
4 marked everything that way.

5 Now they have come back and said the relator can look
6 at her own documents from her file, the DOJ documents, but she
7 can't look at any of the other documents Janssen is producing
8 in the case. It doesn't make sense to me.

9 THE COURT: Okay. Mr. Posner.

03:04 10 MR. POSNER: The reason it doesn't make sense is
11 because that's not what we said. What we said was -- for
12 attorneys' eyes only right now there's a reason why you have an
13 attorneys' eyes only limitation, right? It's so others have
14 limited access. So we said, look, it's fine for the DOJ
15 production. It's fine for her own documents. We're not going
16 to extend that out. We're saying the same thing in this narrow
17 way. We're saying we're not going to blanket extend that out
18 to every document we produce. We're willing to talk to them
19 about other attorneys' eyes documents that the relator can see.
03:04 20 The relator works for, Ted, Novartis, is that right?

21 MR. LEOPOLD: She works for another company. The core
22 issue is she's already seen documents that are being produced.
23 She's under a protective order. We are keeping all eyes only
24 for attorneys until you can --

25 MR. POSNER: This --

1 MR. LEOPOLD: Let me just finish. You've interrupted
2 me several times today. You've circled the wagon on attorneys'
3 eyes only for everyone. We just want her to be able to review
4 the documents that are being produced in this litigation by
5 your client. She's -- she's under a protective order so
6 there's no harm. So I don't understand why she cannot see the
7 rest of the documents that might be relevant that you're
8 producing.

9 MR. POSNER: She might be. All we're saying is we're
03:05 10 not going to apply -- you never apply an attorneys' eyes only
11 designation to the plaintiff for every document. In every case
12 there's a protective order that doesn't provide. That's why we
13 have this elevated level of protection. What we're saying is,
14 fine, for the DOJ production -- and there may be other
15 attorneys' eyes only designations where we're going to have an
16 issue with the relator. We're just not willing to extend it
17 out for everything we're going to produce for the rest of the
18 case, particularly given she works for a competitor.

19 THE COURT: Mr. Posner, how do you propose that if
03:06 20 they want to show her something they're allowed to do it?

21 MR. POSNER: They come to us and they ask. If they're
22 being unreasonable about it, we'll come to you.

23 THE COURT: Can we say that you'll confer on groups of
24 documents that are not allowed to be shown to her?

25 MR. POSNER: Sure.

1 THE COURT: If there's millions of documents, I don't
2 think they have to come to you for every specific page of every
3 specific document, right?

4 MR. POSNER: Sure. Your Honor, every case has this
5 prohibition. Every complex civil case has the following
6 prohibition: For attorneys' eyes only that means attorneys'
7 eyes only. That means the plaintiff can't see it. They're
8 saying she needs to see everything you produced in this case.
9 We're saying, yes, there's things we've designated as
03:07 10 attorneys' eyes only. There's a bunch of stuff we can see that
11 she can see. What we're saying is we're not willing to extend
12 that out for the rest of case for documents that we haven't
13 even produced or reviewed yet.

14 THE COURT: I'm going to ask -- so the parties need to
15 work out some workable arrangement for designating documents
16 that are attorneys' eyes only that plaintiff can still see or
17 perhaps plaintiff cannot see, but that's something you're going
18 to have to work out between yourself. It shouldn't be too
19 cumbersome.

03:07 20 I have to go now. We're going to have another status
21 conference on June 3rd at 2 o'clock. I want a status -- that's
22 a Thursday. I want a status report to be filed on that
23 Tuesday, which would be June 1st, by close of business, on
24 where you are. If you want to do letters as you've been doing,
25 that's fine.

1 Anything else that we just have to cover? I have
2 another group waiting?

3 MR. LEOPOLD: Appreciate your time, your Honor.

4 THE COURT: Okay. I'll try and put what we've done
5 here on the docket. Thank you very much.

6 (Whereupon, the proceedings adjourned at 3:10 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS)

I, Kristin M. Kelley, certify that the foregoing is a correct transcript from the record of proceedings taken May 6, 2021 in the above-entitled matter to the best of my skill and ability.

/s/ Kristin M. Kelley

May 11, 2021

Kristin M. Kelley, RPR, CRR
Official Court Reporter

Date